Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Inflexion Communications'	)	
Petition for Declaratory Ruling that its	)	WC Docket No. 04-52
ExtendIP VoIP Service is Exempt from	)	
Access Charges	)	

NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION
INITIAL COMMENTS

The National Telecommunications Cooperative Association (NTCA)[1] urges the Federal Communications Commission (Commission or FCC) to deny the Inflexion Communications Corporation (Inflexion) petition requesting that its ExtendIP voice over Internet protocol (VoIP) service be declared exempt from access charges. The petition is a misguided attempt to avoid the payment of lawful intrastate and interstate access charges.[2] Exempting Inflexion's VoIP calls that originate and/or terminate on the public switched telecommunications network (PSTN) from FCC-approved interstate access and state commission-approved intrastate access charges would impose a significant and rapidly growing cost burden on ILECs and prevent ILECs from recovering these costs from cost-causing VoIP providers, such as Inflexion. This would result in the unlawful confiscation of ILEC property without just compensation in direct violation of the 5th Amendment of the United States Constitution.[3]

---

[1] NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents more than 560 rural rate-of-return regulated telecommunications providers. All of its members are full service incumbent local exchange carriers (ILECs) and many of its members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). All of NTCA's members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

[2] *In the Matter of the Petition for Declaratory Ruling that Inflexion Communications' ExtendIP VoIP Service is Exempt from Access Charges*, p. 2, WC Docket 04-25, DA 04-627 (filed February 27, 2004).

[3] No person shall be … deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Constitution, 5th Amendment.

Moreover, the issues raised in the Inflexion petition are already being considered in the Commission's comprehensive Notice of Proposed Rulemakings (NPRMs) concerning inter-carrier compensation and IP-Enabled services.[4] In the IP-Enabled services NPRM, the Commission stated that, as a policy matter, it believes that "any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network."[5] The Commission further maintained "that the cost of the PSTN should be borne equitably among those that use it in similar ways."[6] VoIP services are emerging and the future application of access charges to these services should therefore be thoroughly considered in the comprehensive IP-Enabled services and inter-carrier compensation NPRM proceedings, and not in the duplicative Inflexion petition.

Lastly, NTCA urges the Commission to open a rulemaking proceeding to eliminate the enhanced service provider (ESP) exemption that allows all Internet service providers (ISPs) to avoid paying access charges and universal service fund (USF) contributions. Until the ESP exemption is removed, just compensation for the rising ISP use of ILEC networks will not be realized and the future viability of universal service will be at risk. The ESP exemption has unfairly increased the universal service burden on all remaining USF contributors and imposed significant revenue losses on rural ILECs. The Commission should therefore eliminate the ESP exemption and require all ISPs, and VoIP providers that use the PSTN, to pay applicable access charges and appropriate universal service contributions pending the FCC's final decisions in the

[4] *In the Matter of Developing a Unified Intercarrier Compensation Regime,* Notice of Proposed Rulemaking, CC Docket No. 01-92, FCC 01-132 (rel. April 27, 2001), and *IP-Enabled Services,* Notice of Proposed Rulemaking, WC Docket No. 04-36 (rel. March 11, 2004).

[5] *IP-Enabled Services,* Notice of Proposed Rulemaking, ¶ 33, WC Docket No. 04-36 (rel. March 11, 2004).

[6] *Id.*

inter-carrier compensation and IP-Enabled services NPRM proceedings. The Commission "cannot afford to let the rise of VoIP to undercut the very networks that carry it."[7]

I. INTRODUCTION

On February 27, 2004, Inflexion filed its petition requesting that its VoIP service be declared exempt from access charges. As the basis for the petition, Inflexion claims that access charges establish a cost floor that prevents Inflexion from deploying its VoIP service to low-income and underserved customers.[8] The Inflexion petition is without merit and should be denied.

II. THE INFLEXION PETITION WOULD HARM LOW-INCOME CONSUMERS

Inflexion fails to demonstrate how low-income consumers would pay for the underlying high-speed Internet access (broadband) service that Inflexion must have in order to provide its VoIP service. If low-income consumers had to pay for broadband service in order to receive voice service, many consumers would be left without voice service because they simply cannot afford broadband service. Today, however, many of these same consumers can afford basic voice service through the federal and state Lifeline and Linkup universal service programs without the added expense of a high-speed broadband connection. If Inflexion truly cannot provide VoIP service to low-income consumers, it is not because of access charges, but rather its current cost to provide broadband service.

Moreover, if Inflexion and other VoIP providers were allowed a free ride from paying access charges, the Commission would be handing VoIP providers an unfair advantage in the highly competitive voice communications market in direct conflict with its own principle of

---

[7] Statement of Commissioner Jonathan S. Adelstein, Voice over IP Forum (December 1, 2003), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-241774A1.doc.

[8] *In the Matter of the Petition for Declaratory Ruling that Inflexion Communications ExtendIP VoIP Service is Exempt from Access Charges*, p. 4, WC Docket 04-52 (filed on February 27, 2004).

competitive neutrality.[9] Exemption or forbearance of VoIP service from access charges would force ILECs to unjustly raise their customer rates to recover costs imposed on their networks by VoIP providers or incur substantial revenue losses.[10] ILEC consumers would have no protection from either higher end-user rates, degradation in the quality of their underlying ILEC network, or the possible loss of their carrier of last resort. Rate shock and potential loss of subscribers to the PSTN and IP networks would be a very real possibility, particularly for lower income consumers who do not qualify for LifeLine or Linkup support and who cannot afford a high-speed Internet access connection: specifically, working families who currently can afford ILEC telephone service and/or dial-up Internet service but cannot afford the high-speed Internet access connection that VoIP providers, such as Inflexion, must have in order to offer voice service.[11]

III. INFLEXION'S VoIP SERVICE SHOULD BE CLASSIFIED AS A "TELECOMMUNICATIONS SERVICE" AND INFLEXION SHOULD BE REQUIRED TO PAY ACCESS CHARGES AND USF CONTRIBUTIONS

The Commission should classify Inflexion's VoIP service as a "telecommunications service" subject to access charges and universal service contributions.[12] The Act defines "telecommunications services" as the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of

[9] The FCC's principle of competitive neutrality requires that rules neither unfairly advantage or disadvantage one provider over another and neither unfairly favor or disfavor one technology over another.

[10] The Commission may forbear from the regulation of telecommunications carriers or telecommunications services only if it determines the regulation of the carrier or service is: (1) not necessary to achieve just and reasonable rates, (2) not necessary for the protection of consumers, and (3) forbearance is consistent with the public interest. 47 U.S.C. § 159(10)(a)(3).

[11] Forbearance from assessing access charges on VoIP traffic is not in the public interest. Access charges and universal service obligations fall principally and mandatorily on telecommunications service providers, such as Inflexion, in recognition of the fact that they benefit from the nationwide public telecommunications system which is supported by access charges and USF contributions. Inflexion and other providers should not be excused from these obligations under the guise that they will be shackled by regulation. The imposition of access and universal service obligations on these providers is not pervasive regulation of entry or rates. Applying access charges to VoIP providers will eliminate the potential for regulatory arbitrage, ensure competitive neutrality, and provide all providers of voice services with certainty pending the outcome of the major proceedings on universal service support, inter-carrier compensation and IP-Enabled services.

[12] 47 U.S.C. § 153(47).

facilities used. Customers of Inflexion's voice service pay a fee for sending and receiving voice telephone calls. Inflexion's VoIP service uses North American Numbering Plan (NANP) telephone numbers to facilitate voice calls throughout the PSTN. Inflexion uses the PSTN in the same way as other carriers who pay access and contribute to universal service in recognition of the fact that their use imposes costs on the underlying ILEC network. From the customer's perspective, Inflexion's VoIP service is identical to traditional telephone voice service. The fact that Inflexion uses the PSTN, NANP telephone numbers, and charges customers for its voice service, clearly demonstrates that its voice service should be classified as a "telecommunications service" and that Inflexion should be required to pay access charges and USF contributions.

IV. INFLEXION'S PETITION WOULD LIKELY RESULT IN CONFISCATION

Exempting Inflexion's VoIP service from access charges without first accounting for jurisdictional separations would likely result in improperly preempting state commission jurisdiction and raise the issue of confiscation.[13] The Commission should not unintentionally mandate zero compensation for Inflexion's obvious use of local networks without considering the jurisdictional cost shifts involved. In *Smith v. Illinois*, the Supreme Court stated that "proper regulation of rates can be had only by maintaining the limits of state and federal jurisdiction" to determine whether rates would result in confiscation.[14] The Court held that when distinct jurisdictional limits exist as to the determination of reasonable rates, some form of jurisdictional separations must occur. The Court further established that "reasonable measures [are] essential" and indicated that such measures should not "ignore altogether the actual uses to which the property is put."[15] The Commission's actions should therefore take into consideration state

[13] *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 51 S.Ct. 65 (1930).
[14] *Id.*
[15] *Id.*

commission jurisdiction and the separation of carrier property and expenses between interstate and intrastate operations in order to avoid issues of preemption and confiscation. Denying the Inflexion petition and addressing these issues in the comprehensive IP-Enabled services and inter-carrier compensation NPRMs will assist the Commission in determining the best course of action and avoid unnecessary litigation.

V. THE COMMISSION SHOULD ELIMINATE THE ESP EXEMPTION

Since 1983, the Commission has exempted ESPs from the payment of interstate access charges.[16] Consequently ESPs, including ISPs, are treated as end-users for the purpose of applying access charges and are, therefore, entitled to pay local business rates for their connections to LEC central offices and the PSTN.[17] Despite the Commission's understanding that ISPs use interstate access services, the Commission has permitted ISPs to take service under local tariffs and avoid paying interstate access charges and USF contributions.

In 1997, the Commission reconfirmed its previous finding that ISPs should not be required to pay interstate access charges at that time.[18] The Commission explained that the then-existing access charge system included non-cost-based rates and inefficient rate structures.[19] The Commission further reasoned that ISP purchases of tariffed primary and secondary lines provided ILECs with revenues for the costs imposed on their networks by ISPs.[20]

---

[16] This policy is known as the "ESP exemption." *See MTS/WATS Market Structure Order*, 97 FCC 2d at 715 (ESPs have been paying local business service rates for their interstate access); *see also*, Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, CC Docket 87-215, Order, 3 FCC Rcd 2631, 2633 (1988) (*ESP Exemption Order*).

[17] *ESP Exemption Order*, 3 FCC Rcd at 2635 n.8, 2637 n.53. *See also, Access Charge Reform Order,* 12 FCC Rcd at 16133-35.

[18] *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges,* CC Docket Nos. 96-262, 94-1, 91-213, 95-72, FCC 97-157, ¶¶ 344-348 (First Report and Order)(rel. May, 16. 1997).

[19] *Id.*

[20] *Id.*

It is time to remove the ESP exemption for ISPs. The non-cost based rates and inefficient rates structures that existed in 1997, no longer exist today. With the implementation of the CALLS[21] and MAG[22] access reform plans for non-rural and rural ILECs access charges have been reduced to historical lows and are based on cost. Moreover, primary line growth has been flat and secondary line growth has declined. At the same time, ISP usage of the PSTN has continued to increase dramatically and has placed a significant and rapidly growing cost burden on ILECs without adequate compensation for ISP usage.

The ESP exemption permits carriers to sell their services to customers while benefiting from the free ride that ISPs receive as a result of the exemption. Exempting ISPs from access charges and USF contributions have increased the universal service burden on all remaining USF contributors. If VoIP services are added to the list of services exempt from access charges and USF contributions, the entire universal service funding system will be at risk of collapsing. A VoIP exemption would create a regulatory arbitrage incentive for telecommunications voice service providers to remove their traffic from a PSTN-based platform to an Internet-based platform to simply avoid paying legitimate access charges and universal service contributions. The Commission should therefore remove the ESP exemption and require all ISPs and VoIP service providers to pay access charges and universal service contributions.

---

[21] *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, Sixth Report and Order, CC Docket Nos. 96-262, 94-1, Report and Order, CC Docket No. 99-249, and Order, CC Docket No. 96-45, FCC 00-193 (rel. May 31, 2000).

[22] *In the Matter of Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Federal-State Joint Board on Universal Service, Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation, Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 00-256, Fifteenth Report and Order, CC Docket No. 96-45, and Report and Order, CC Docket Nos. 98-77, 98-166, FCC 01-304 (rel. November 8, 2000).

VI. CONCLUSION

Based on the above reasons, the Commission should deny Inflexion's petition for declaratory ruling. The Commission should classify Infexion's VoIP service as a "telecommunications service" and require Inflexion to pay all applicable interstate and intrastate access charges and make all appropriate contributions to the universal service funding mechanisms pending the Commission's final decisions in its inter-carrier compensation and IP-Enabled services NPRMs. Finally, the Commission should open a rulemaking proceeding to eliminate the ESP exemption that allows ISPs to avoid paying access charges and USF contributions. Until the ESP exemption is removed, just compensation for ISP use of ILEC networks will not be realized, competitive neutrality will not be achieved, and the future viability of universal service will be at risk.

Respectfully submitted,

NATIONAL TELECOMMUNICATIONS
COOPERATIVE ASSOCIATION

By: /s/ L. Marie Guillory
L. Marie Guillory

By: /s/ Daniel Mitchell
Daniel Mitchell

Its Attorneys

4121 Wilson Boulevard, 10th Floor
Arlington, VA 22203

April 7, 2004

CERTIFICATE OF SERVICE

I, Gail Malloy, certify that a copy of the foregoing Comments of the National Telecommunications Cooperative Association in WC Docket No. 04-52, DA 04-627 was served on this 7th day of April 2004 by first-class, U.S. Mail, postage prepaid, to the following persons.

/s/ Gail Malloy
Gail Malloy

Chairman Michael K. Powell
Federal Communications Commission
445 12th Street, SW, Room 8-B201
Washington, D.C. 20554

Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, SW, Room 8-B115
Washington, D.C. 20554

Commissioner Kevin J. Martin
Federal Communications Commission
445 12th Street, SW, Room 8-A204
Washington, D.C. 20554

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, SW, Room 8-A302
Washington, D.C. 20554

Qualex International Portals II
445 12th Street, SW
Room CY-B402
Washington, D.C. 20554

Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 12th Street, SW, Room 8-C302
Washington, D.C. 20554

William Maher, Chief
Wireline Competition Bureau
Federal Communications Commissions
445 12th Street, SW, Room 5-A221
Washington, D.C. 20554

Keith Machen
David Berninger
Inflexion Communications Corporation
645 Griswold Street, Suite 1800
Detroit, MI 48226